IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

TUESDAY, THE 23RD OCTOBER 2007 / 1ST KARTHIKA 1929

WP(C).No. 33950 of 2005(N)

PETITIONER:

SREEKALA.A.R,
W/O.LATE MOHANAN, COOK, OLDAGE HOME
(VRIDHA MANDIRAM),
DEPT. OF SOCIAL WELFARE,
ITHITHANAM.P.O, KOTTAYAM.

BY ADV. SRI.M.V.THAMBAN

RESPONDENTS:
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1. **THE SUPERINTENDENT,**
   OLDAGE HOME, VRIDHA MANDIRAM,
   ITHITHANAM.P.O, KOTTAYAM.

2. **THE DIRECTOR,**
   DEPARTMENT OF SOCIAL WELFARE,
   THIRUVANANTHAPURAM.

3. **STATE OF KERALA,**
   REP. BY THE SECRETARY TO THE GOVERMENT
   DEPARTMENT OF SOCIAL WELFARE, GOVT.SECRETARIAT,
   THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.33950/2005

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ORDER NOP.OAH 23/05 DT. 8.6.05 BY TE IST RESPONDENT.

EXT.P2:- COPY OF THE LETTER NI.EII(2) 25507/05/K.DIS DT. 28.9.05. BY THE DIRECTOR.

EXT.P3:- COPY OF THE JUDGMENT DT. 26.2.03.

EXT.P4:- COPY OF THE JUDGMENT DT. 17.10.05 IN WP(C) NO.33403/04.

/TRUE COPY/

P.A. TO JUDGE

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V. GIRI ,J.

WP(C).NO.33950 of 2005

Dated this the 23rd day of October, 2007

JUDGMENT

By Ext.P1 order, the petitioner was appointed as a Cook in the Old age Home, conducted by the Department of Social Welfare for a period of 179 days or till regular hands join duty. Ext.P1 order specifically states that the appointment is made under Rule 9(a)(1) of Part II of KS& SSR for a period of 179 days. By Ext.P2 order dated 23/9/2005, the second respondent Director informed the Superintendent that the petitioner's services will have to be terminated on completion of 179 days. Petitioner claims that though she was appointed on a provisional basis, she had undergone a selection procedure after being sponsored in that regard by the Employment Exchange and this is the method of appointment prescribed in relation to the post of Cook coming under category 4B of the last grade servants. Petitioner contends that the procedure adopted in the case of the petitioner was regular procedure for appointment to the post of Cook in the various departments. Consequently the tenure of appointment in Ext.P1 is liable to be ignored and the petitioner must be declared to have been regularly appointed to the post

of Cook. Reliance in this regard is placed on Ext.P3 judgment of the Division Bench.

2. Post of Cook was included in the various department in category-4 of the last grade servants. Method of appointment in respect of category – 4 contemplates that for 50% of the post in the department is by promotion of Part-time contingent employees. There should be a current seniority list prepared by the District Collectors on revenue district wise basis and in the absence of suitable hands under Item-1, then by direct recruitment through Employment Exchange. Note-VI to category-4 says that only Part-time Barbers and Part-time Cooks will be eligible for promotion as Barbers and Cooks respectively in the various department. Thus, the principal method of recruitment is by promotion of Part-time contingent employees and in the case of Barbers and Cooks, the feeder category is Part-time Barbers and Part-time Cooks. Direct recruitment through Employment Exchange is resorted to only in the absence of Part-time Barbers and Part-time Cooks, in so far as the post of Barbers and cooks in the various departments are concerned.

3. In the circumstances, I find it difficult to accept the

contention of the petitioner that merely because she was sponsored by the Employment Exchange, she should be considered as having been regularly recruited to the post of Cook and that her appointment must be treated as a regular appointment, not on a provisional basis. Even in the matter of appointments on a provisional basis, it cannot be said that the department is not entitled to follow the procedure and invite applications from persons registered in the Employment Exchange. In the present case, the petitioner was selected and she was appointed on a provisional basis. It does not mean that notwithstanding the clear terms of appointment, the petitioner's appointment should nevertheless be treated as a permanent one and not a provisional appointment.

4. Learned counsel for the petitioner submits that apparently a method of appointment as prescribed in the special rules was adopted in the present case and if there were no persons eligible as Part-time Barbers and Part-time Cooks in the various department, then there is no reason why the petitioner's recruitment should not be treated as a permanent one. In my view if the order of appointment clearly specifies the tenure of

appointment and the special rules do not prohibit a provisional appointment, it may not be proper for the appointing authority to direct that what is otherwise treated as a provisional appointment, should be considered as a regular appointment. That would be violative of the special rules as also Rule 9(a)(1) of Part II of KS&SSR. An expost facto regularization of provisional appointments, where the statutory rules provide for provisional appointment as such, has been deprecated by the Supreme Court in **State of Karnataka v Umadevi** (2006(4) SCC 1).

5. Learned counsel for the petitioner submits that in Ext.P3 judgment, a Division Bench of this Court has, in the case of Hospital Attendant Grade II, held that where the method of appointment contemplates promotion from among Part-time contingent employees and in the absence of such persons by direct recruitment, and persons are appointed by direct recruitment, then notwithstanding the fact that the orders of appointment showed the tenure of appointment as provisional and limited to 179 days, nevertheless the appointment must be treated as regular and the appointees must be treated as regular

appointees. It may be noted that Ext.P3 judgment has been taken up before the Supreme Court and it is admitted that orders of stay have been passed by the Supreme Court, insofar as the Division Bench has directed that persons whose services were terminated are to be re-engaged.

6. Ext.P3 judgment was later considered by this Court in **Vasanthi v State of Kerala** (2006 (1) KLT 288). Learned judge of this Court directed that the services of the petitioners in the said case should not be terminated till the Supreme Court takes a decision in the special leave petition pending against Ext.P3 judgment.

7. Insofar as the present case is concerned, the post is different and Note VI to Category-4 shows that insofar as promotion is concerned, only Part-time Cooks can aspire for promotion to the post of Cook.

8. Taking into account all these facts and circumstances, the writ petition is disposed of in the following terms:

1) The second respondent Director of Social Welfare shall consider the case of the petitioner with specific reference to the question as to whether there was any person functioning

as Part-time Cook in the Revenue District of Kottayam on the date on which the intimation leading to Ext.P1 was received by the Employment Exchange. The second respondent may call for remarks, in this regard, from the District Collector, Kottayam. Orders may be passed, after hearing the petitioner, within a period of three months from the date of receipt of a copy of this judgment.

2) Petitioner shall be permitted to continue in service as a Cook till a decision is taken by the Director in the manner aforementioned.

V. GIRI, JUDGE

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